

IN THE COUNTY COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 2019MM002346AXXX & 2019MM002348AXXX
DIVISION B

STATE OF FLORIDA

vs.

ROBERT KRAFT,
Defendant.

/

**ORDER GRANTING, IN PART, DEFENDANT'S MOTION
FOR PROTECTIVE ORDER**

Defendant's several Motions for Protective Order came before the Court on April 12, 2019.

William A. Burck, Esq. represented Defendant.

Deanna K. Shullman, Esq., Dana J. McElroy, Esq., and L. Martin Reeder, Esq. each represented a different group of Media-Intervenors.¹

The State of Florida also appeared, the State's position being argued by Greg Kridos, Assistant State Attorney. The State took no position on the Defendant's Motions.

INTRODUCTION

A seventy-eight year old man walks into a day spa and, in addition to receiving conventional spa services, he allegedly engages in illegal sexual activity. That seems like a rather tawdry but fairly unremarkable² event. But if that man is the owner of the most successful franchise in, arguably, the most popular professional sport in the United States, an

entirely different dynamic arises, especially if the encounter is captured on videotape, and the incident is the focus of much media attention and pretrial publicity.³

At the risk of hyperbole, while the underlying charge in this case may be only a misdemeanor, it places in sharp contest issues fundamental to society, i.e. the right of the public to be fully informed about the operations of its government, through the media's First Amendment rights, and the right of a defendant to a fair trial, guaranteed through the Sixth Amendment. Also implicated are Article I, sec. 16 of the Florida Constitution guaranteeing a defendant the right to be tried "by impartial jury in the county where the crime was committed" and Article, Sec. 24 guaranteeing "every person the right to inspect or copy any public record made or received in connection with the official business of any public body." Each side makes compelling arguments but in the end, it is not possible to accommodate equally each side's interests.

The Court concludes that Defendant's right to a fair trial requires the disputed videotape be withheld from Intervenors for a limited duration as described specifically, below.

ANALYSIS AND CONCLUSIONS OF LAW

1. Defendant is charged with violating Florida Statutes § 796.07(2)(f) and (5)(a) 1, soliciting another to commit prostitution, pursuant to Informations filed February 25, 2019.⁴
2. Jupiter Police Department obtained a "sneak and peak" search warrant⁵ which resulted in hidden surveillance cameras being installed in Orchids of Asia Day Spa. Over the course

of five days, events occurring in various massage rooms of the spa were recorded. These videos reflect some allegedly illegal sexual contact between customers and masseuses, and some legal physical contact between them as well.

3. The probable cause affidavits (PCAs⁵) allege illegal sexual contact occurred between Defendant and one or more masseuses on January 19, 2019 (case # 2019MM002346) and January 20, 2019 (case # 2019MM002348). In addition, the PCA^s shows that on each date video surveillance captured the alleged illegal sexual contact.

4. Intervenors assert their First Amendment rights to obtain and, presumably, broadcast and disseminate these videotapes as they wish. The media derive their right to intervene as surrogates for the public's collective right to be informed of government action.

5. Media attention on these cases has been focused and widespread from their inception. Initially, law enforcement thought the instant cases, as well as others filed as the result of the investigation at this spa, reflected human trafficking. Law enforcement and the State have receded from that position according to the State's pronouncement at the hearing.

6. Clearly, these videotapes are not being sought for the purpose of seeking the public's assistance to identify and apprehend a perpetrator. Furthermore, Intervenors acknowledge that the events depicted on the videotapes are described fully in the PCA^s.⁶

7. The videotapes allow the participants in the alleged criminal activity, including Defendant, to be visually identified, and depict the conduct resulting in the charges.

8. The Court finds this matter to be governed by Florida Rule of Criminal Procedure

3.220(1).⁷ That Rule authorizes the Court to issue protective orders restricting or deferring disclosures for cause.⁸ In determining “cause” under that Rule, the Florida Supreme Court instructed trial courts to consider “relevant factors”, these factors being those described in the three-prong Lewis test.⁹

9. Even if Rule 3.220(1) does not specifically apply, case law clearly states that the trial court has inherent power to control its proceedings and the trial court is responsible for protecting a defendant’s fair trial rights.¹⁰ The Florida Supreme Court has adopted the principle that the right to a fair trial is the most fundamental of all freedoms and must be preserved at all costs.¹¹ In balancing public access with a defendant’s fair trial rights, public access must yield, the considerations weighing in favor of a defendant.¹² Therefore, this Court proceeds under Fl. R. Crim. Proc. 3.220(1) or, in the alternative, under the inherent authority residing with the trial court to protect a defendant’s fair trial rights under the Sixth Amendment.

10. The videotapes, at the time this Order is entered, have not become a judicial public record; they have not been placed with the Clerk of Court and Defendant has not participated in discovery. However, the purpose of the ruling in McCrary is to provide a mechanism for determining what pretrial material should or should not be disclosed to the public. Therefore, the considerations required under Lewis/McCrary are equally applicable in this case. In addition, as stated in McCrary, “there is no first amendment right of access to pretrial discovery material.”¹³ Even if and when such material becomes a public record, the statutory

right to media access must be balanced against constitutional fair trial rights.¹⁴

11. The Court finds that preventing access at this time to the videotapes sought by the Intervenors is necessary to prevent a serious and imminent threat to the administration of justice. The parties agree that what the videotapes provide is the visual depiction of the mental images created by the written descriptions in the PCA^s. The Intervenors' argument to disclose at this time is seriously undercut by the graphic nature of the descriptions in the PCA^s. Intervenors essentially argue that the videotapes add little to what the public already knows through the PCA^s and disclosure does not prejudice Defendant. If that is true, then the argument cuts both ways. Because the videotapes add little of value to the public's knowledge of the case, a restriction of temporary duration is a slight disaccommodation to the public, clearly outweighed by the risk posed to Defendant's fair trial rights under the Sixth Amendment.

12. Furthermore, the Court is seriously concerned about allowing the media to disclose to the public a piece of evidence that would be (or could be) central to the case against Defendant. In effect, the potential jury pool would be given the opportunity to preview trial evidence, including identifying Defendant as the person depicted in the videotapes. During voir dire, attorneys are not permitted to discuss evidence to be presented at trial. Were these videotapes put in the public sphere, what is impermissible at voir dire would have already been accomplished. Defendants are guaranteed a fair and impartial trial by jury, not a trial by community.

13. Pretrial publicity is not the central concern of this Court. The Court has reviewed the Bundy¹⁵ and Rolling¹⁶ cases cited by Intervenors. Both cases centered on pretrial publicity and a change of venue. The Rolling court noted specifically that no pictures of the victims and crime scenes had been disclosed to the public.¹⁷ The Bundy case discussed only pretrial publicity and did not address pretrial disclosure of evidence.

14. If the instant case involved only pretrial publicity, then the standard techniques for selecting a fair and impartial jury would be satisfactory. But this case goes a significant step further and Intervenors argue the media is entitled to place in the public sphere, for any and all potential jurors to peruse, as many times as desired, with the opportunity to share with others in the jury pool, what appears to be a central piece of evidence in this case, and which clearly identifies Defendant according to the PCAs and the parties. It is difficult for this Court to see how providing opportunities to preview the evidence does not jeopardize Defendant's right to a fair trial. Although Defendant's name may be fairly well known as a public figure, his facial characteristics and body image most likely are not nearly as well-known. Thus, this Court is seriously concerned about the videotapes showing Defendant, and showing the very acts he allegedly committed, being disseminated pretrial. This Order is based on the attention pretrial publicity draws to a piece of evidence central to this case. The Court concludes making these images public, at this time, seriously jeopardizes Defendant's fundamental right to a fair and impartial jury.

15. This case has drawn extraordinary media attention and it is not because of the nature

of the alleged crime. Rather, it is because Defendant is who he is. In an age of digitized images, even though the products of some of the Intervenors are not aimed at the Palm Beach County market, that does not matter. Images are no longer bound by the reach of broadcast antenna and delivery of newspapers. Consumers now can reach out on their own and obtain in seconds whatever images are available online. Consumers have the further opportunity to share all that is placed on the Internet. These circumstances compel the Court to rule as it does.

16. No alternatives are available, other than a possible need to change venue, which would protect Defendant's right to a fair trial. The Court has considered requiring pixelating the face and sexually graphic content of the videotapes as a condition of disclosure. However, this redaction is substantially defeated by the PCA^s.

17. The Court finds restricting the videotapes from the Intervenors pretrial would protect Defendant's fair trial rights.

18. As the Lewis court states, "the trial court ... must extend its order no further than the circumstances warrant."¹⁸ In the context of this case that means the delay in disclosing the videotapes to the media must be limited to only such duration as necessary to avoid tainting the jury pool. It is not an appropriate exercise of the Court's authority merely to protect a defendant from embarrassment.

19. The Court has considered two other arguments to support Defendant's request for a protective order, namely, a right to privacy, and that the videotapes are exempt from

disclosure under Chapter 119, Florida Statutes, as being part of an active criminal investigation. The Court does not find these arguments legally or factually sufficient to support Defendant's request.

Based on the foregoing, it is

ADJUDGED that:

Defendant's several Motions for Protective Order are granted only to the following extent:

1. The videotapes at issue in these cases shall not be released to the Intervenors until the earliest to occur of one of the following:
 - a. Trial juries being sworn in each case;
 - b. The cases resolving by plea agreement;
 - c. The State no longer pursuing the charges against Defendant.
 - d. At any other time at which the Court finds the fair trial rights of Defendant are not at risk, after notice to the parties and hearing thereon.
2. This Order pertains to all video, photographic, and audio evidence showing or relating to Defendant, collected via surveillance conducted within the Orchids of Asia Spa during the period from January 18, 2019 through January 22, 2019.
3. The Town of Jupiter Police Department and the SAO of the 15th Judicial Circuit, its agents, representatives, servants, employees, and attorneys, and anyone acting in concert or participation with them, shall not disseminate, publicize, or otherwise transmit the videotapes depicting Defendant to any person, party, organization, or entity.

4. The Court reserves the right to reconsider this Order after ruling on Defendant's Motion to Suppress scheduled for April 26, 2019, upon proper motion and notice thereon.

ORDERED at West Palm Beach, Florida, on this 23 day of April, 2019.


LEONARD HANSER
County Court Judge

¹ Prior to hearing the Motions for Protective Order, the Court granted the several Motions to Intervene of each group of media-Intervenors.

² "Unremarkable" only in the sense that the charge is far from uncommon in misdemeanor court in Palm Beach County.

³ It appears to the Court there are at least forty-two media outlets included among the Intervenors.

⁴ The charge is identical in both cases.

⁵ Defendant raises Fourth Amendment issues regarding the search warrant. A Motion to Suppress is scheduled for April 26, 2019. Nothing in this Order is to be construed as addressing any matters raised in Defendant's Motion to Suppress.

⁶ Defense and Intervenors concur that the PCA^s sufficiently describe the events depicted on the videotapes and the Court has not viewed them.

⁷ The Court finds some support for its position in Florida Rule of Judicial Administration 2.420. That Rule states "The public shall have access to records of the judicial branch of government, except as provided below." Rule 2.420(c) provides certain records of the judicial branch to be confidential, among which is "[A]ny court record determined to be confidential in case decision or court rule on the grounds that confidentiality is required to prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice..." Rule 2.420(c)(9)(A)(i). It appears the disputed videotapes technically are not a "court record" as defined in Rule 2.420(b)(1)(A). However, if the videotapes become a court record, they still may attain confidential status.

⁸ Florida Freedom Newspapers, Inc. v. McCrary, 520 So. 2d 32 (Fla. 1988).

⁹ Miami Herald Publishing Co. v. Lewis, 426 So. 2d 1 (Fla. 1983).

¹⁰ Id. at 4.

¹¹ McCrary at 34, citing Estes v. Texas, 381 U.S. 532, 85 S. Ct. 1628 (1965).

¹² Id. at 34.

¹³ McCrary at 36.

¹⁴ Id.

¹⁵ Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988).

¹⁶ Rolling v. State, 695 So. 2d 278 (Fla. 1997).

¹⁷ Id. at 287.

¹⁸ Lewis at 8.

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